

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Acceleration of Broadband Deployment)	WC Docket No. 11-59
Expanding the Reach and Reducing the Cost of)	
Broadband Deployment by Improving Policies)	
Regarding Public Rights of Way and Wireless)	
Facilities Siting)	

REPLY COMMENTS OF THE CITY OF EL CERRITO

The City of El Cerrito (“City”) files these comments in response to the Notice of Inquiry (“NOI”) released April 7, 2011, in the above-entitled matter. The City’s comments are limited to responding to the misleading statements of PCIA and CTIA regarding the City’s temporary moratorium on a narrow class of wireless telecommunication facilities. It was particularly disappointing to the City to read those characterizations of the moratorium because it was enacted in part to provide an opportunity to determine whether the City could develop new regulations that would accelerate the deployment of wireless technology, including broadband. Seeing actions that attempt to advance the dual interests of the telecommunications industry and the public mischaracterized as interference with the Federal goal of broadband deployment—presumably to provide a basis from which to argue for further restrictions on local control over land use decisions and for the industry’s financial benefit and not out of concern for good public policy—leaves the City with little choice other than to conclude that the telecommunications industry is not engaged in this process in good faith.

As an initial matter, the City notes that it only learned about the statements from PCIA and CTIA because of the efforts of the International Municipal Lawyers Association (“IMLA”) to alert local governments. Since the two organizations did not have the common decency to inform the local government agencies themselves, if not for IMLA’s intervention, the City would have been denied an opportunity to respond. Since the City believes that PCIA’s and CTIA’s comments misrepresent the nature and effect of the moratorium, perhaps it is no surprise that they did not inform the City of its inclusion in their respective comments in this proceeding.

To understand the manner in which PCIA and CTIA have misrepresented the City’s ordinance, it is helpful to know a little about El Cerrito’s current regulatory framework for wireless telecommunications facilities. Under most circumstances, collocation of facilities

requires no City approval at all.¹ Collocated facilities that are not exempt and facilities that are affixed to existing structures require only a use permit and design review that can be approved administratively, when the facilities are located in one of four zoning districts.² Under those regulations, the City's experience has been that the overwhelming majority of new wireless telecommunications facilities applications propose to place the facilities in one of those three zones and to affix them to existing structures, resulting in a fast administrative approval process. Other types of facilities and facilities in other zoning districts require design review approval from the City's Design Review Board and a conditional use permit ("CUP") from the Planning Commission. Even that process has been relatively quick, and the City has received few complaints from the wireless telecommunications industry about it.

It also may be helpful to understand something about the City's topography: "The topography of El Cerrito is characterized by a gently sloping plain in the western portion of the city (nearest the bay) and the west-facing slopes of the Berkeley Hills, which rise above the bay to an elevation of approximately 900 feet. The city is divided into two topographic regions: the lower elevations characterized by a traditional grid pattern of development and the higher elevations with steeper slopes and a development pattern prescribed by the contours of the land."³ It is the City's understanding that the hilly terrain creates some challenges for wireless providers to achieve complete coverage, and the City has worked with them to fill any gaps in a manner that balances residents' and businesses' interests in good service with the public's interest in a visually appealing environment.

In September 2009, the City received an application from T-Mobile to construct the first new monopole in the City since 2001. The application proposed a 70-foot-tall pole with up to 12 antennae in the "monopine" style; it would have been located on property owned by the Boy Scouts, which was once used as a quarry. The property is zoned PR (Parks and Recreation), but is not rural land in an isolated corner of the City. It is surrounded by a residential neighborhood and a highly used park. The closest residence would have been 285 feet away, the park 117 feet away.

As City staff got further along in the processing of the application and the public discussion of the project began in earnest, the staff began to contemplate an issue that was not receiving much attention: isn't there a better way to do this? El Cerrito residents and businesses want fast wireless internet access and reliable cell phone service. Staff understood that that demand was likely to drive wireless providers to increase the amount of equipment installed in the City. In light of the rapid advances in wireless technologies, however, it seemed to the City staff that there must be a way to accomplish full coverage of the City by all interested wireless providers in a manner that would not necessitate a string of 70-foot-tall poles running across the hilly portion of El Cerrito. At that point, they concluded that they should propose to the City

¹ Collocated facilities are exempt from the City's ordinance as long as the existing facility was approved by the City, it will not exceed the height of the existing facility, and it will be consistent with applicable massing limitations. El Cerrito Municipal Code ("ECMC") § 19.28.020(A).

² ECMC § 19.28.050. Exempt facilities must also be designed to minimize visibility. ECMC § 19.28.040(E)(4) and (E)(5).

³ City of El Cerrito 1999 General Plan at 3-5, http://www.el-cerrito.org/planning/pdf/GPCHAPTER_3.pdf.

Council a temporary moratorium on new wireless telecommunications facilities that require a conditional use permit. Their view was that such a moratorium would give them time to understand current and upcoming technologies better so that they could prepare an overhaul of the applicable ordinance to make it easier for wireless providers to deploy those new technologies. That process is underway.

It is important to note two relevant features of the moratorium ordinance approved by the City Council. First, it applies only to the issuance of CUPs for wireless telecommunications facilities. The overwhelming majority of wireless providers have been able to meet their facilities needs in El Cerrito without a CUP. In fact, both the most recent new wireless telecommunication facility and the most recent facility upgrade processed prior to enactment of the moratorium did not require CUPs. Moreover, the ordinance specifically states that the City will accept and process applications for CUPs during the moratorium. No other company has submitted such an application since the moratorium went into effect, although the staff has received several inquiries. Second, the ordinance includes a provision for a wireless provider to submit an application for a conditional use permit and accompany it with written evidence supporting an argument that the moratorium either discriminates among providers of functionally equivalent services or prohibits or has the effect of prohibiting the provision of personal wireless services. If the decisionmaking body finds that evidence submitted is sufficient, then it may approve the application despite the moratorium. That provision was crafted to be consistent with 47 U.S. 332(c)(7)(B), and thereby protect the interests of wireless providers.⁴ T-Mobile never availed itself of the opportunity to supplement its application with such evidence, apparently choosing instead to secretively and misleadingly complain about the City's policies to the Commission through industry representatives.

To address a few specific points regarding the way in which CTIA and PCIA characterized the City's moratorium:

- PCIA's comments about the City's moratorium appear in a section entitled, "Excessive Collocation Application Requirements Unnecessarily Delay Deployment."⁵ As noted above, the City's moratorium applies only to an extremely narrow set of collocated facilities and does not affect the vast majority of such facilities, which are either exempt from the City's ordinance or can be approved administratively. More broadly, the comment states only how long the moratorium has been in effect, providing no contextualizing information about it and thereby potentially misleading readers about its purpose and effect.
- CTIA's comments state that "wireless opponents" "obtained" the moratorium, "forc[ing]" T-Mobile to cancel its plans for the project.⁶ The City obviously does not think that is a fair representation of the facts. In particular, the decision to pursue a

⁴ The moratorium was first adopted as Ordinance No. 2010-07 on May 17, 2010. It was extended by Ordinance Nos. 2010-08 and 2011-03. Copies of the ordinances are attached as Exhibit A. The scope of the moratorium is set forth in Section 2 of all ordinances. The two exceptions described are set forth in Section 3 of all ordinances.

⁵ See Comments of PCIA – The Wireless Infrastructure Association and the Das Forum (A Membership Section of PCIA), WC Docket No. 11-59, Ex. B at 6.

⁶ See Comments of CTIA—The Wireless Association, WC Docket No. 11-59, at 16.

moratorium was internally driven and intended to improve local regulation, not to kill a particular project. Additionally, the ordinance provided an opportunity for T-Mobile to pursue the application despite the moratorium, and T-Mobile chose to put the project “on hold” instead.

According to the NOI, the goal of this proceeding is to develop national policy that maximizes consumer and industry benefit by accelerating broadband deployment, in part, by improving wireless facilities siting requirements. The City’s moratorium was enacted for the same purpose. One wireless service provider’s pending application was paused as a result. That company neither modified its proposal to avoid the moratorium nor used the procedures in the moratorium ordinance to obtain a hearing on the application. No other provider has thus far informed the City that it has been negatively affected by the moratorium. The City believes that the Commission should place more emphasis on the nature of the moratorium and the future outcome of its policy review than on the minor ill effects of the moratorium on a single wireless services provider.

Respectfully submitted,

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1706077.2

EXHIBIT A

ORDINANCE NO. 2010-07

AN URGENCY ORDINANCE OF THE CITY OF EL CERRITO MAKING FINDINGS AND ESTABLISHING A CITY-WIDE MORATORIUM ON THE ISSUANCE OF CONDITIONAL USE PERMITS FOR WIRELESS TELECOMMUNICATIONS FACILITIES PENDING A REVIEW OF EXISTING REGULATIONS OF SUCH FACILITIES AND STUDY OF OPPORTUNITIES TO ENCOURAGE THE USE OF NEW TECHNOLOGY THAT WOULD ELIMINATE OR REDUCE THE NEED FOR SUCH FACILITIES

WHEREAS, Chapter 19.28 of the El Cerrito Municipal Code ("ECMC") regulates the installation and modification of wireless telecommunications facilities (sometimes hereafter "facilities"). It requires administrative design review and administrative use permits for some facilities but requires a conditional use permit for others. For example, the installation of new wireless telecommunications facilities installed within existing structures, and therefore hidden from public view, require only administrative design review. In contrast, new towers and monopoles proposed to be built on private property require a conditional use permit. When the City Council approved Chapter 19.28 in 2008, it believed that the regulations were sufficient to protect the public health, safety, and welfare; that they maximized local control of potentially problematic facilities within the bounds imposed by case law interpreting the 1996 Telecommunications Act; and that they sufficiently anticipated the development and implementation of new technology; and

WHEREAS, even since that time, both the legal and technological landscape has changed significantly. For example, later in 2008, in *Sprint Telephony PCS, L.P. v. County of San Diego* (2008) 543 F.3d 571 ("*Sprint*"), the Ninth Circuit Court of Appeals expressly overruled existing Ninth Circuit jurisprudence relating to provisions of the federal Telecommunications Act of 1996 that had been expansively interpreted to limit local authority to regulate the installation of wireless telecommunications facilities. In 2009, the Ninth Circuit further explained the grounds on which a city may and may not deny permits for wireless telecommunications facilities. *See, e.g., Sprint PCS Assets v. City of Palos Verdes Estates* (9th Cir., 2009) 583 F.3d 716 (finding that the city may regulate WTF in the public right-of-way for aesthetic reasons and upholding the denial of a permit on that basis, but requiring further factual review of whether the denial would result in a denial of service in violation of the TCA); *T-Mobile USA v. City of Anacortes* (9th Cir., 2009) 572 F.3d 987 (holding that the City had failed to identify a viable alternative that would fill the carrier's demonstrated service gap); and

WHEREAS, the federal judiciary's revised interpretation of several relevant provisions of the Telecommunications Act warrants a review of Chapter 19.28 to ensure that it provides the maximum protection of the public health, safety, and welfare, while also ensuring the rights of wireless telecommunications companies to install new equipment demonstrated to be necessary to provide service and maintain competitiveness; and

WHEREAS, since last updating its regulations of wireless telecommunications facilities, the City has noted several significant changes within the wireless telecommunications industry, including but not limited to a dramatic increase in the use of data services by customers, associated with "smartphones," mobile broadband devices, and wireless home internet access; more wireless telecommunications companies committing to the implementation of "fourth generation" wireless networks, either WiMAX or LTE, with presently uncertain implications for the future of wireless telecommunications equipment; and a proliferation of wireless telecommunications facilities in El Cerrito and nearby communities as services providers adapt to changes in usage by customers, changes in technology, and adoption of new standards; and

WHEREAS, because of the noted changes in the wireless telecommunications industry, the City believes that opportunities may exist to encourage the implementation of new technologies that would eliminate or reduce the need for the construction of new wireless telecommunications facilities that require a conditional use permit under Chapter 19.28. Absent those regulations, it seems likely that a significant number of new wireless telecommunications towers and monopoles will be constructed in El Cerrito, with potentially negative effects on the environment and the public health, safety, and welfare. If those effects could be avoided by comprehensive planning for the City's wireless telecommunications future, the avoided unnecessary construction and impacts would be consistent with the City Council's declared goal of environmental leadership. It would also enhance the quality of life of El Cerrito residents and benefit wireless telecommunications services customers and providers; and

WHEREAS, the City has recently received an application for a conditional use permit for a new, 70-foot-tall wireless telecommunications tower in the hillside portion of El Cerrito, potentially within sight of residential areas and adjacent to a public park. In reviewing that application, the City's staff observed the need to review its current regulations of such facilities in light of changes in applicable law and potential opportunities for encouraging the implementation of alternative technology, both of which would avoid the likely health, safety, and welfare impacts of processing and potentially approving applications for such facilities under existing regulations. If the City does not undertake review of its regulations now, those negative impacts will result; and

WHEREAS, not undertaking review of the City's regulations of wireless telecommunications facilities would potentially:

1. Create land use incompatibilities including excessive height of poles and towers;
2. Create visual and aesthetic blight and potential safety concerns arising from excessive size, height, or lack of camouflaging of wireless telecommunications facilities and their associated pedestals, equipment, and meters;

3. Create visual and aesthetic blight and potential safety concerns, by failing to capitalize on alternative technologies, collocation opportunities, and protocols for investigating the feasibility of alternative installation locations and configurations;

4. Create traffic and pedestrian safety hazards due to unsafe location of poles, towers, equipment boxes or other materials or construction related to wireless telecommunications facilities;

5. Create operational conflicts with other land uses, facilities, or utility systems authorized or existing on the same or adjacent sites;

6. Deteriorate the quality of life in a particular community or neighborhood;
or

7. Miss opportunities to accelerate the implementation of new wireless telecommunications technologies in El Cerrito, which might improve service for customers, improve business for providers, and reduce the environmental and quality-of-life impacts of continuing to construct towers, monopoles, and other facilities that might be unnecessary; and

WHEREAS, based on the foregoing, the City Council finds that issuing conditional use permit for wireless telecommunications facilities, prior to the completion of the City's review of its existing regulations and opportunities to implement new regulations to encourage the use of new wireless technologies, poses a current and immediate threat to the public health, safety, and welfare, and that therefore a temporary moratorium on the issuance of such permits is necessary.

NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF EL CERRITO DOES HEREBY ORDAIN AS FOLLOWS, ADOPTED AS AN INTERIM ORDINANCE UNDER THE PROVISIONS OF CALIFORNIA GOVERNMENT CODE SECTION 65858:

SECTION 1. Incorporation of Recitals. The City Council finds that all Recitals are true and correct and are incorporated herein by reference.

SECTION 2. Moratorium Imposed.

A. In accordance with the authority granted the City of El Cerrito under Article XI, Section 7 of the California Constitution and California Government Code Section 65858, from and after the effective date of this ordinance, and for a period of 45 days thereafter, no conditional use permits shall be approved or issued under section 19.28.050(D) of the El Cerrito Municipal Code ("ECMC") for wireless telecommunications facilities.

B. During the moratorium imposed by this ordinance, wireless telecommunications facilities that require only administrative design review or

administrative use permits may still be approved under ECMC sections 19.28.050(B) and (C), respectively.

C. For the purposes of this ordinance, the term "wireless telecommunications facilities" shall have the same meaning as in ECMC section 19.28.010.

SECTION 3. Applications for Conditional Use Permits for Wireless Telecommunications Facilities during Moratorium.

A. Except to the extent otherwise prohibited by law, this temporary moratorium is not intended to, and does not, affect the acceptance or processing of applications for conditional use permits for any and all wireless telecommunications facilities that require a conditional use permit under ECMC 19.28.050(D); rather, it is intended to, and does, prohibit only the approval and issuance of conditional use permits for such Wireless Facilities. City staff shall continue to accept applications for wireless telecommunication facilities. At the written request of an applicant for a conditional use permit for a wireless telecommunications facility during the term of this moratorium, the City shall continue to process such applications; however, any new standards for wireless telecommunications facilities and the permitting thereof that are adopted during the moratorium and are effective at its expiration shall apply to such applications. Any time limits or mandatory approval time frames relative to the processing or action upon conditional use permit applications for wireless telecommunications are tolled during the term of this moratorium.

B. To ensure compliance with the provisions of 47 U.S.C. section 332(c)(7)(B), an applicant that believes that the moratorium imposed by this ordinance either (a) unreasonably discriminates among providers of functionally equivalent services or (b) prohibits or has the effect of prohibiting the provision of personal wireless services shall so state in its application for a conditional use permit and provide substantiating written evidence. If Planning Division staff believe that substantial evidence in the written record establishes either of the above-stated criteria, they shall schedule a hearing on the application. To approve a conditional use permit for wireless telecommunications facility subject to the moratorium imposed by this ordinance, the decisionmaker must find, in addition to all the other required findings for the granting of a conditional use permit, that substantial evidence in the written record establishes that either of the above-stated criteria are met.

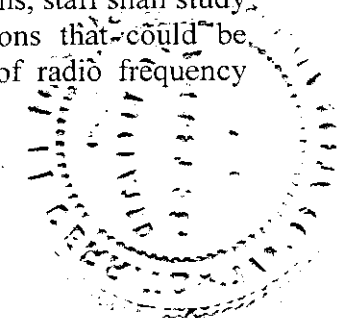
C. Because this ordinance is necessary to protect public health, safety, and welfare, it shall operate retroactively as to all wireless telecommunications facilities conditional use permits that have been approved and issued or applied for prior to the effective date of this ordinance, unless the right to construct a wireless telecommunications facility has vested pursuant to *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal. 3d 785 .

SECTION 4. Authority; Urgency Statement. This ordinance is an interim ordinance, adopted as an urgency measure pursuant to Government Code section 65858

and is for the immediate and long-term preservation of the public peace, health, and welfare. The following facts constitute an urgency within the meaning of that statute: The City has recently received an application for a conditional use permit for a new 70-foot-tall wireless telecommunications tower in the hillside area of El Cerrito, potentially within site of a residential area and adjacent to a public park. Since the adoption of ECMC Chapter 19.28, nearly all new wireless telecommunications facilities have been located within existing or modified structures, thus furthering the goals of Chapter 19.28 and minimize the impact of the facilities on the public health, safety, and welfare. The City has, however, received an application for a conditional use permit for a new 70-foot-tall wireless telecommunications tower in the hillside area of El Cerrito that would potentially be within sight of a residential area and adjacent to a public park. In light of the facts contained in the Recitals set forth in this ordinance, the City is concerned that the regulations for wireless telecommunications facilities that require a conditional use permit may not maximize protection of the public health, safety, and welfare, while also recognizing the right of wireless telecommunications companies to install new equipment demonstrated to be necessary to maintain competitiveness. Additionally, the City is interested in examining whether there are opportunities to restructure its regulations of wireless telecommunications facilities to encourage the implementation of new technologies that would eliminate the need for the types of facilities that require conditional use permits under Chapter 19.28. The approval of conditional use permits for such facilities would frustrate the City's review of its regulations by allowing the construction of facilities that might be considered harmful to the public health, safety, and welfare and unnecessary if new technologies could be used instead. Accordingly, approval or issuance of conditional use permits for wireless telecommunications facilities presents a current and immediate threat to the public health, safety, and welfare.

SECTION 5. Establishment of Wireless Telecommunications Facilities in Violation of This Ordinance Declared Public Nuisance. The establishment of a wireless telecommunications facility in violation of this ordinance during the duration of this moratorium or any extension thereof is declared to be a public nuisance. Violations of this ordinance may be enforced by any applicable laws or ordinances, including but not limited to injunctions, or administrative or criminal penalties under the ECMC.

SECTION 6. Initiation of Study of Wireless Telecommunications Facilities Regulations and Opportunities for Comprehensive Development of System in El Cerrito. Staff is hereby directed to study the City's existing regulations of the development of wireless telecommunications facilities and whether modifications of ECMC Chapter 19.28 would provide additional reasonable protections of the general health, safety, and welfare of the residents of the City, alleviating the current and immediate threat described in Section 4 of this ordinance. Staff shall also study opportunities for the City that may mitigate the potential threat to the public health, safety and welfare. Additionally, although the federal law generally preempts local regulation of wireless telecommunications facility siting based upon radio frequency emissions, staff shall study whether there are permissible and non-burdensome local regulations that could be enacted to reduce public concern over the perceived health risks of radio frequency



emissions. Staff may retain the assistance of such consultant expertise as it deems necessary to assist with study directed by this ordinance.

SECTION 7. Compliance with California Environmental Quality Act (CEQA). This ordinance is not a "project" within the meaning of section 15378 of the State CEQA Guidelines, because it has no potential for resulting in a direct or reasonably foreseeable indirect physical change in the environment. It temporarily prevents certain physical changes in the environment pending completion of the study direction in Section 6. Furthermore, this urgency ordinance is categorically exempt from CEQA under Guidelines section 15308 because it is a regulatory action taken by the City, in accordance with Government Code section 65858, to assure maintenance and protection of the environment.

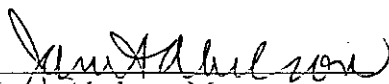
SECTION 8. Severability. If any provision of this ordinance or the application thereof to any person or circumstance is held invalid, the remainder of the ordinance, including the application of such part or provision to other persons or circumstances, shall not be affected thereby, and shall continue in full force and effect. To this end, provisions of this ordinance are severable. The City Council hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause or phrase hereof, irrespective of the fact that any one or more sections, subsections, subdivisions, paragraphs, sentences, clauses, or phrases be held unconstitutional, invalid, or unenforceable.

SECTION 9. Effective Date. This ordinance shall become effective immediately upon adoption, if adopted by at least four-fifths vote of the City Council, and shall be in effect for 45 days from the date of adoption, unless extended by the City Council as provided for in Government Code section 65858.


The foregoing ordinance was introduced and approved at a regular meeting of the City Council on May 17, 2010, by the following vote on:

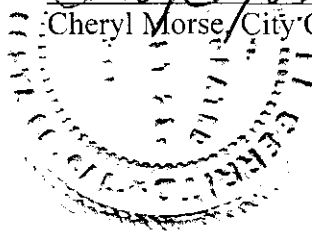
AYES: Councilmembers Cheng, Jones, Lyman, Potter and Mayor Abelson
NOES: None
ABSENT: None
ABSTAIN: None

APPROVED:


Janet Abelson, Mayor

ATTEST:


Cheryl Morse, City Clerk



ORDINANCE CERTIFICATION

I, Cheryl Morse, City Clerk of the City of El Cerrito, do hereby certify that this Urgency Ordinance is the true and correct original Ordinance No. 2010-07 of the City of El Cerrito; that said Urgency Ordinance was duly enacted and adopted by the City Council of the City of El Cerrito at a meeting of the City Council held on the 17th day of May, 2010; and that said Ordinance has been ordered published and/or posted in the manner required by law.

WITNESS my hand and the Official Seal of the City of El Cerrito, California, this 19th day of May, 2010.


Cheryl Morse, City Clerk

1425411.2

ORDINANCE NO. 2010-08

AN URGENCY ORDINANCE OF THE CITY OF EL CERRITO MAKING FINDINGS AND EXTENDING A CITY-WIDE MORATORIUM ON THE ISSUANCE OF CONDITIONAL USE PERMITS FOR WIRELESS TELECOMMUNICATIONS FACILITIES PENDING A REVIEW OF EXISTING REGULATIONS OF SUCH FACILITIES AND STUDY OF OPPORTUNITIES TO ENCOURAGE THE USE OF NEW TECHNOLOGY THAT WOULD ELIMINATE OR REDUCE THE NEED FOR SUCH FACILITIES

WHEREAS, Government Code section 65858 allows the City to immediately protect and preserve the public peace, health, and welfare by prohibiting any uses that may be in conflict with a contemplated zoning proposal; and

WHEREAS, at its May 17, 2010 meeting, pursuant to Government Code section 65858, the City Council lawfully adopted a moratorium on issuance of conditional use permits for wireless telecommunications facilities pending a review of existing regulations of such facilities and study of opportunities to encourage the use of new technology that would eliminate or reduce the need for such facilities; and

WHEREAS, staff has analyzed the existing El Cerrito Municipal Code provisions, held internal meetings and undertaken fact-gathering, and explored how other jurisdictions have addressed wireless telecommunication facilities to determine what new or alternative options may be available to regulate this use; and

WHEREAS, staff has also initiated the scoping of studies it deems necessary and appropriate to make a recommendation to City Council regarding possible changes in the structuring of zoning and other necessary regulatory controls over the installation, augmentation, relocation and operation of wireless telecommunications facilities in the City to cause such land uses to be beneficial land uses rather than uses that are detrimental to or cause blight to occur within the City of El Cerrito; and

WHEREAS, studies have not yet been completed, and staff needs additional time to continue to study the potential impacts such facilities may have on the public health, safety and welfare in order to:

- (1) Fully understand the impact associated with the installation of wireless telecommunications facilities in the City that require a Conditional Use Permit;
- (2) Safeguard against the intrusion of incompatible and potentially disruptive uses that cause blight; and
- (3) Survey residents of El Cerrito for information about use and preferences regarding wireless telecommunication facilities; and

- (4) Identify consultants to conduct a study of existing regulations and opportunities to encourage new technology; and
- (5) Explore regulatory options that are consistent with state and federal law, for better managing and minimizing the safety, aesthetic, co-location, and additional management issues implicated by the potential proliferation of wireless telecommunications facilities in those areas of the City; and
- (6) Ascertain whether there are regulations or other measures that the City could consider undertaking to encourage the implementation of new technologies to deliver wireless telecommunications services without the use of facilities that require a Conditional Use Permit.

WHEREAS, such regulatory controls include, without limitation, restrictions on the placement of non-stealth installations such as monopoles, height limitations on wireless antenna, co-location requirements, equipment undergrounding requirements, appropriate camouflaging, use of opportunities maps to highlight preferred locations, and justification study requirements; and

WHEREAS, on June 28, 2010, in accordance with Government Code sections 65858(a) and 65090, the City Council held a properly noticed public hearing to consider extending the moratorium for a period of ten (10) months and fifteen (15) days from the date that Ordinance No. 2010-07 would have otherwise expired; and

WHEREAS, adoption of this Ordinance does not require review under the California Environmental Quality Act (Pub. Resources, Code, §§ 21000, *et seq.*, "CEQA") based on the following:

- (1) This Ordinance is not a project within the meaning of Section 15378 of the State CEQA Guidelines, because extension of a temporary moratorium has no potential for resulting in either a direct or indirect physical change in the environment.
- (2) This Ordinance is categorically exempt from CEQA pursuant to Section 15308 of the CEQA Guidelines as a regulatory action taken by the City pursuant to its police power and in accordance with Government Code Section 65858 to assure maintenance and protection of the environment pending the evaluation and adoption of contemplated local legislation, regulation and policies.

NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF EL CERRITO DOES HEREBY ORDAIN AS FOLLOWS, ADOPTED AS AN INTERIM ORDINANCE UNDER THE PROVISIONS OF CALIFORNIA GOVERNMENT CODE SECTION 65858:

Section 1. Incorporation of Recitals. The City Council finds that all Recitals are true and correct and are incorporated herein by reference.

Section 2. Moratorium Extended. In accordance with the authority granted the City of El Cerrito under Article XI, Section 7 of the California Constitution and California, Government Code Section 65858, the moratorium imposed by Ordinance No. 2010-07 -- which provides that no conditional use permits shall be approved or issued for wireless telecommunications facilities, while facilities that require only administrative design review or administrative use permits may still be approved -- shall hereby be extended for a period of ten (10) months and fifteen (15) days, from and after the date that Ordinance No. 2010-07 would have otherwise expired.

Section 3. Authority: Urgency Statement. This ordinance is an interim ordinance, adopted as an urgency measure pursuant to Government Code section 65858 and is for the immediate and long-term preservation of the public peace, health, and welfare. The following facts constitute an urgency within the meaning of that statute: The City has recently received an application for a conditional use permit for a new 70-foot-tall wireless telecommunications tower in the hillside area of El Cerrito, potentially within site of a residential area and adjacent to a public park. Since the adoption of ECMC Chapter 19.28, nearly all new wireless telecommunications facilities have been located within existing or modified structures, thus furthering the goals of Chapter 19.28 and minimize the impact of the facilities on the public health, safety, and welfare. The City has, however, received an application for a conditional use permit for a new 70-foot-tall wireless telecommunications tower in the hillside area of El Cerrito that would potentially be within sight of a residential area and adjacent to a public park. In light of the facts contained in the Recitals set forth in this ordinance, the City is concerned that the regulations for wireless telecommunications facilities that require a conditional use permit may not maximize protection of the public health, safety, and welfare, while also recognizing the right of wireless telecommunications companies to install new equipment demonstrated to be necessary to maintain competitiveness. Additionally, the City is interested in examining whether there are opportunities to restructure its regulations of wireless telecommunications facilities to encourage the implementation of new technologies that would eliminate reduce the need for the types of facilities that require conditional use permits under Chapter 19.28. The approval of conditional use permits for such facilities would frustrate the City's review of its regulations by allowing the construction of facilities that might be considered harmful to the public health, safety, and welfare and unnecessary if new technologies could be used instead. Accordingly, approval or issuance of conditional use permits for wireless telecommunications facilities presents a current and immediate threat to the public health, safety, and welfare.

Section 4. Compliance with California Environmental Quality Act (CEQA). This ordinance is not a "project" within the meaning of section 15378 of the State CEQA Guidelines, because it has no potential for resulting in a direct or reasonably foreseeable indirect physical change in the environment. It temporarily prevents certain physical changes in the environment pending completion of the study direction in Section 6 of Ordinance No. 2010-07. Furthermore, this urgency ordinance is categorically exempt from CEQA under Guidelines section 15308 because it is a regulatory action taken by the City, in accordance with Government Code section 65858, to assure maintenance and protection of the environment.

Section 5. Severability. If any provision of this ordinance or the application thereof to any person or circumstance is held invalid, the remainder of the ordinance, including the


application of such part or provision to other persons or circumstances, shall not be affected thereby, and shall continue in full force and effect. To this end, provisions of this ordinance are severable. The City Council hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause or phrase hereof, irrespective of the fact that any one or more sections, subsections, subdivisions, paragraphs, sentences, clauses, or phrases be held unconstitutional, invalid, or unenforceable.

Section 6. Effective Date. This ordinance shall become effective immediately upon adoption, if adopted by at least four-fifths vote of the City Council, and shall be in effect for ten (10) months and fifteen (15) days from the date of adoption, unless extended by the City Council as provided for in Government Code section 65858.


The foregoing ordinance was introduced and approved at a special meeting of the City Council on June 28, 2010, by the following vote on:

AYES: Councilmembers Cheng, Jones, Lyman, Potter and Mayor Abelson
NOES: None
ABSTAIN: None
ABSENT: None

APPROVED:


Janet Abelson, Mayor

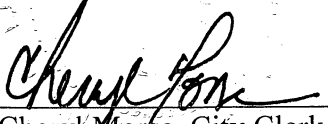
ATTEST:


Cheryl Morse, City Clerk

ORDINANCE CERTIFICATION

I, Cheryl Morse, City Clerk of the City of El Cerrito, do hereby certify that this Ordinance is the true and correct original Ordinance No. 2010-08 of the City of El Cerrito; that said Ordinance was duly enacted and adopted by the City Council of the City of El Cerrito at a meeting of the City Council held on the 28th day of June, 2010; and that said Ordinance has been ordered published and/or posted in the manner required by law.

WITNESS my hand and the Official Seal of the City of El Cerrito, California, this
2nd day of July, 2010.


Cheryl Morse, City Clerk

1460219.2

ORDINANCE NO. 2011-03

AN URGENCY ORDINANCE OF THE CITY OF EL CERRITO MAKING FINDINGS AND EXTENDING A CITY-WIDE MORATORIUM ON THE ISSUANCE OF CONDITIONAL USE PERMITS FOR WIRELESS TELECOMMUNICATIONS FACILITIES PENDING A REVIEW OF EXISTING REGULATIONS OF SUCH FACILITIES AND STUDY OF OPPORTUNITIES TO ENCOURAGE THE USE OF NEW TECHNOLOGY THAT WOULD ELIMINATE OR REDUCE THE NEED FOR SUCH FACILITIES

WHEREAS, Government Code Section 65858 allows the City to immediately protect and preserve the public peace, health, and welfare by prohibiting any uses that may be in conflict with a contemplated zoning proposal; and

WHEREAS, at its May 17, 2010 meeting, pursuant to Government Code section 65858, the City Council lawfully adopted a moratorium on issuance of conditional use permits for wireless telecommunications facilities pending a review of existing regulations of such facilities and study of opportunities to encourage the use of new technology that would eliminate or reduce the need for such facilities; and

WHEREAS, at its June 28, 2010 meeting, pursuant to Government Code section 65858, the City Council lawfully adopted an ordinance extending the moratorium on issuance of conditional use permits for wireless telecommunications facilities; and

WHEREAS, staff has analyzed the existing El Cerrito Municipal Code provisions, held internal meetings and undertaken fact-gathering, and explored how other jurisdictions have addressed wireless telecommunication facilities to determine what new or alternative options may be available to regulate this use; and

WHEREAS, staff has also initiated the scoping of studies it deems necessary and appropriate to make a recommendation to City Council regarding possible changes in the structuring of zoning and other necessary regulatory controls over the installation, augmentation, relocation and operation of wireless telecommunications facilities in the City to cause such land uses to be beneficial land uses rather than uses that are detrimental to or cause blight to occur within the City of El Cerrito; and

WHEREAS, studies have not yet been completed, and staff needs additional time to continue to study the potential impacts such facilities may have on the public health, safety and welfare in order to:

- (1) Fully understand the impact associated with the installation of wireless telecommunications facilities in the City that require a Conditional Use Permit; and
- (2) Safeguard against the intrusion of incompatible and potentially disruptive uses that cause blight; and

- (3) Survey residents of El Cerrito for information about use and preferences regarding wireless telecommunication facilities; and
- (4) Identify consultants to conduct a study of existing regulations and opportunities to encourage new technology; and
- (5) Explore regulatory options that are consistent with state and federal law, for better managing and minimizing the safety, aesthetic, co-location, and additional management issues implicated by the potential proliferation of wireless telecommunications facilities in those areas of the City; and
- (6) Ascertain whether there are regulations or other measures that the City could consider undertaking to encourage the implementation of new technologies to deliver wireless telecommunications services without the use of facilities that require a Conditional Use Permit.

WHEREAS, such regulatory controls include, without limitation, restrictions on the placement of non-stealth installations such as monopoles, height limitations on wireless antenna, co-location requirements, equipment undergrounding requirements, appropriate camouflaging, use of opportunities maps to highlight preferred locations, and justification study requirements; and

WHEREAS, on May 2, 2011, in accordance with Government Code sections 65858(a) and 65090, the City Council held a properly noticed public hearing to consider extending the moratorium for a period of one year from the date that Ordinance No. 2010-08 would have otherwise expired; and

WHEREAS, adoption of this Ordinance does not require review under the California Environmental Quality Act (Pub. Resources, Code, §§ 21000, *et seq.*, "CEQA") based on the following:

- (1) This Ordinance is not a project within the meaning of Section 15378 of the State CEQA Guidelines, because extension of a temporary moratorium has no potential for resulting in either a direct or indirect physical change in the environment.
- (2) This Ordinance is categorically exempt from CEQA pursuant to Section 15308 of the CEQA Guidelines as a regulatory action taken by the City pursuant to its police power and in accordance with Government Code Section 65858 to assure maintenance and protection of the environment pending the evaluation and adoption of contemplated local legislation, regulation and policies.

NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF EL CERRITO DOES HEREBY ORDAIN AS FOLLOWS, ADOPTED AS AN INTERIM ORDINANCE UNDER THE PROVISIONS OF CALIFORNIA GOVERNMENT CODE SECTION 65858:

Section 1. Incorporation of Recitals. The City Council finds that all Recitals are true and correct and are incorporated herein by reference.

Section 2. Moratorium Extended. In accordance with the authority granted the City of El Cerrito under Article XI, Section 7 of the California Constitution and California, Government Code Section 65858, the moratorium imposed by Ordinance No. 2010-08 -- which provides that no conditional use permits shall be approved or issued for wireless telecommunications facilities, while facilities that require only administrative design review or administrative use permits may still be approved -- shall hereby be extended for a period of one year, from and after the date that Ordinance No. 2010-08 would have otherwise expired.

Section 3. Authority; Urgency Statement. This ordinance is an interim ordinance, adopted as an urgency measure pursuant to Government Code section 65858 and is for the immediate and long-term preservation of the public peace, health, and welfare. The following facts constitute an urgency within the meaning of that statute: At the time that the City Council initiated the moratorium continued by this ordinance, the City had received an application for a conditional use permit for a new 70-foot-tall wireless telecommunications tower in the hillside area of El Cerrito, potentially within sight of a residential area and adjacent to a public park. Since the adoption of ECMC Chapter 19.28, nearly all new wireless telecommunications facilities have been located within existing or modified structures, thus furthering the goals of Chapter 19.28 and minimizing the impact of the facilities on the public health, safety, and welfare. The application for the 70-foot-tall wireless telecommunications tower would have potentially been in conflict with the goals of Chapter 19.28, causing harm to the public health, safety, and welfare. In light of the facts contained in the Recitals set forth in this ordinance, the City is concerned that the regulations for wireless telecommunications facilities that require a conditional use permit may not maximize protection of the public health, safety, and welfare, while also recognizing the right of wireless telecommunications companies to install new equipment demonstrated to be necessary to maintain competitiveness. Additionally, the City is interested in examining whether there are opportunities to restructure its regulations of wireless telecommunications facilities to encourage the implementation of new technologies that would eliminate reduce the need for the types of facilities that require conditional use permits under Chapter 19.28. The approval of conditional use permits for such facilities would frustrate the City's review of its regulations by allowing the construction of facilities that might be considered harmful to the public health, safety, and welfare and unnecessary if new technologies could be used instead. Accordingly, approval or issuance of conditional use permits for wireless telecommunications facilities present s a current and immediate threat to the public health, safety, and welfare.

Section 4. Compliance with California Environmental Quality Act (CEQA). This ordinance is not a "project" within the meaning of section 15378 of the State CEQA Guidelines, because it has no potential for resulting in a direct or reasonably foreseeable indirect physical change in the environment. It temporarily prevents certain physical changes in the environment pending completion of the study direction in Section 6 of Ordinance No. 2010-08. Furthermore, this urgency ordinance is categorically exempt from CEQA under Guidelines section 15308 because it is a regulatory action taken by the City, in accordance with Government Code section 65858, to assure maintenance and protection of the environment.

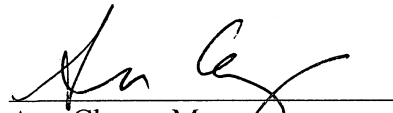
Section 5. Severability. If any provision of this ordinance or the application thereof to any person or circumstance is held invalid, the remainder of the ordinance, including the application of such part or provision to other persons or circumstances, shall not be affected thereby, and shall continue in full force and effect. To this end, provisions of this ordinance are severable. The City Council hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause or phrase hereof, irrespective of the fact that any one or more sections, subsections, subdivisions, paragraphs, sentences, clauses, or phrases be held unconstitutional, invalid, or unenforceable.

Section 6. Effective Date. This ordinance shall become effective immediately upon adoption, if adopted by at least four-fifths vote of the City Council, and shall be in effect for one year from the date of adoption, unless extended by the City Council as provided for in Government Code section 65858.


The foregoing ordinance was introduced and approved at a meeting of the City Council on May 2, 2011, by the following vote on:

AYES:	Councilmembers Abelson, Benassini, Jones, Lyman and Mayor Cheng
NOES:	None
ABSTAIN:	None
ABSENT:	None

APPROVED:


Ann Cheng, Mayor

ATTEST:


Cheryl Morse, City Clerk